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anty of a note by a separate instrument as follows, "I guarantee the said note is good and the payment of the same," is an absolute undertaking and the holder of the note need not commence suit against the maker nor give notice of his default.

By Va. Code 1904, § 2841a (Negotiable Instruments Law, Title II, Article IV, § 159), "protest is dispensed with by any circumstances which would dispense with notice of dishonor."

As the contract of guaranty stated in the above letter was for unconditional payment, no demand or notice was necessary under the authorities cited, and protest was also unnecessary under the code provision above quoted. It seems that the guarantors were not released.

A. P. HULL, *Editorial Staff.*

NOTES OF CASES.

Frauds, Statute of—Promise to Answer for Debt, etc., of Another—Subservience of Pecuniary Interest of Promisor.—In Cincinnati Traction Co. *v.* Cole, 258 Fed. 169, the Circuit Court of Appeals held that under the statute of frauds declaring that no action shall be brought on a promise to answer for the debt, default, or miscarriage of another, unless the agreement is in writing, etc., an oral promise to answer for the debt or default of another is enforceable, where the leading object of the promisor was to subserve some pecuniary or business purpose of his own.

The court said: "The object in view in the enactment of the original statute of frauds is thus stated therein:

'For the prevention of many fraudulent practices which are commonly endeavored to be held by perjury and subornation of perjuries.'

"The interest prompting a Legislature to protect from perjury is not the same in the case of one who has a personal concern in the debt as in that of one who has no such concern therein. Where the promisor has a personal concern in the debt, the making of the promise is not dependent solely on the testimony of witnesses. The fact of having such concern is a corroborating circumstance in support of testimony tending to show the making of the promise. It renders its making more likely.

"These circumstances tend to lead one to take the position, independent of authority, that it is only a promise made by one who has no personal concern in the debt that is within the thought of

the statute and hence within the statute itself. When we come to tradition, we find numerous decisions, some of which are authoritative as to us, in which the promise involved has been held not to be covered by the statute, which can be, and which, in our judgment should be, placed on this ground. The personal concern of the promisor in the debt may be either in its creation or in its payment. It is in its creation, if it is made before or at the time of the creation of the debt. It is in its payment, if made after the creation thereof. The decisions which are authoritative as to us were in cases where the personal concern of the promisor was in the creation of the debt. They are Emerson *v.* Slater, 22 How. 28, 16 L. Ed. 360; Davis *v.* Patrick, 141 U. S. 479, 12 Sup. Ct. 58, 35 L. Ed. 826; Crawford *v.* Edison, 45 Ohio St. 239, 13 N. E. 80.

"The first paragraph of the syllabus in Crawford *v.* Edison is in these words:

'When the leading object of the promisor is, not to answer for another, but to subserve some pecuniary or business purpose of his own, involving a benefit to himself, or damage to the contracting party, his promise is not within the statute of frauds, although it may be in form a promise to pay the debt of another, and its performance may incidentally have the effect of extinguishing that liability.'

"There Crawford, the promisor, contracted with Smith to build him a house. Smith subcontracted with Edison to do some work on the house. After Edison had done about two-thirds of his work, Smith abandoned the job and left the country, without having paid Edison anything. Edison claimed that he then refused to do any more work unless Crawford promised to pay him, and, upon Crawford's so promising him, he completed his work. It was held that, if such was the case, Edison was entitled to recover of Crawford the entire amount of his debt. At the time of the promise Crawford had a personal concern in Edison's finishing his work and the creation of the debt for that portion thereof. Otherwise the house would remain uncompleted. It is true that the evidence on behalf of Edison tended strongly to establish an absolute promise on Crawford's part, and it was left to the jury, as here, to determine whether the promise was absolute or conditional, they being told that if it was conditional there could be no recovery. This of itself was sufficient to sustain the judgment of the lower court on the verdict for plaintiff.

"But the court did not base its affirmance on this ground. but on that set forth in the first syllabus. It is there said that, though in form a promise to pay the debt of another, yet if the leading object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, it is not within the stat-

ute. This statement of the law is taken substantially from the opinion of Mr. Justice Clifford in Emerson *v.* Slater. The promise sued on in that case was made to one who had contracted with a railroad company to build its railroad by one interested in the company as stockholder and creditor, and was to pay promisee a certain sum if he would finish the railroad by a certain day. The promise was treated as one to answer for the debt of the company to the extent of the sum. The personal concern of the promisor was in the creation of the debt. Its creation would result from the finishing of the railroad. Thereby the railroad would be put in condition for operation, and by its operation the promisor would obtain payment of his debt and dividends on his stock. It was held that the promise was not within the statute. Mr. Justice Clifford thus stated the ground of the decision:

'Cases in which the guaranty or promise is collateral to the principal contract, but is made at the same time, and becomes essential ground of the credit given to the principal debtor, are, in general, within the statute of frauds. Other cases arise which also fall within the statute, where the collateral agreement is subsequent to the execution of the debt, and was not the inducement to it, on the ground that the subsisting liability was the foundation of the promise on the part of the defendant, without any other direct and separate consideration moving between the parties. But whenever the main purpose and object of the promisor is not to answer for another, but to subserve some pecuniary or business purpose of his own, involving either a benefit to himself, or damage to the other contracting party, his promise is not within the statute, although it may be in form a promise to pay the debt of another, and although the performance of it may incidentally have the effect of extinguishing that liability.' * * *

"We know no authoritative case where the promise was made after the creation of the debt and the personal concern of the promisor was in its payment. But numerous cases of this character can be cited, the decision in which the promise was not within the statute can and should be placed on the ground that, as the promisor had personal concern in the payment of the debt the promise was not within the thought of the statute. We cite but two, to wit, the early case of Williams *v.* Leper, 3 Burrow, 1886, and that of Landis *v.* Royer, 59 Pa. 95.

"The promise sued on in Williams *v.* Leper was made to a landlord, who was about to distrain the goods of the tenant for arrears of rent, by one to whom the tenant had conveyed his goods for the benefit of his creditors. That sued on in Landis *v.* Royer was made to a materialman, who supplied lumber to a contractor in erecting a house for the promisor, and who had a right to take out a mechanic's lien on the building. Judge Sharswood said:

It was the debt of the defendant's own building, the payment of which could legally be enforced against it; though it may not have been personally his debt, his property was answerable for it, and his engagement to pay was in relief of his property.'

"Judge Campbell, in the course of his opinion in Corkins v. Collins, 16 Mich. 478, thus put the matter:

'When, by the release of the property from a lien, the party promising to pay the debt is enabled to apply it to his own benefit, so that the release inures to his own advantage, it is quite easy to see that a promise to pay the debt in order to obtain the release may be properly regarded as made on his own behalf, and not on behalf of the original debtor, and any possible advantage to the latter is merely incidental, and is not the thing bargained for. That promise is therefore in no proper sense a promise to answer for anything but the promisor's own responsibility, and need not be in writing'

"In cases of this kind the promisor is personally concerned in the payment of the debt, for thereby his property is relieved of it. Possibly there is stronger reason for saying that the promise in cases of this kind is not within the statute than that in cases of the other kind. The ground upon which this may be so is this: According to the phraseology of the statute, the only promise which is within it is one to answer for the debt of another person. This means that the debt shall be solely and exclusively the debt of the third person, and not that of the promisor. Where the creditor has a lien, or the right to take out a lien, on the property of the promisor to secure the debt, it may be said that in a sense it is not solely and exclusively the debt of the third person, but is also the debt of the promisor This is so, in that the property of the promisor is obligated to the payment of the debt. If this reasoning is sound, then it can be said that the ground upon which such a promise is not within the statute is that it is not covered by its phraseology. * * *

"We would submit that the position that it is the thought of the statute that only a promise by a person who has no personal concern in the creation or payment of the debt to which it relates is within it, is reasonable. It cannot be said that a promise by a person who has such concern therein is within the terms or language of the statute. The statute is silent as to the person by whom the promise is made. It is no more within the terms or language thereof than a promise to answer otherwise than out of the promisor's own estate, or than a promise to answer to the debtor or one other than the creditor. The position, therefore, reads no exception into the statute. It is simply one of three limitations on its scope, which one is constrained to put when one passes through its unlimited phraseology to its thought and looks at that phraseology from the other side. And there is nothing in this position that is calculated to lead

one into error. Of course, some limitation must be put upon the words 'personal concern.' The concern must be such as that which existed in the cases cited and others like unto them; i. e., immediate and pecuniary.

"If, then, the views here advanced are sound, a full expression of the thought of the statute as to the character of the promise covered by it would be somewhat like this: It is a promise to answer for the debt of another (i. e., to pay if he does not), made to the creditor by one who has no personal concern in the debt, the answering therefor to be out of his own estate.

Sales—Breach of Contract for Sale of "Season's Output."—In Kenan *v.* Yorkville Cotton Oil Co., 260 Fed. 28, the Circuit Court of Appeals for the Fourth Circuit, held that a contract by a cotton seed oil mill for the sale of its "season's output" was not violated by the closing of its mill before the end of the season for good and sufficient reasons not connected with the contract. The court said:

"There is little dispute about the facts, and the case turns on the construction of the contract. Plaintiff contends that it obligated defendant to operate its mill during the season named, and that raises the decisive question. It is well settled that such a contract as is here considered carries no guaranty that the estimated quantity will be delivered. The promise of the seller is not absolute. It is essentially a pledge of good faith; and so the courts have held. In Brawley *v.* United States, 96 U. S. 168, 171 (24 L. Ed. 622), a case frequently cited, it is said: 'Where a contract is made to sell or furnish certain goods identified by reference to independent circumstances, such as an entire lot deposited in a certain warehouse, or all that may be manufactured by the vendor in a certain establishment, or that may be shipped by his agent or correspondent in certain vessels, and the quantity is named with the qualification of "about," or "more or less," or words of like import, the contract applies to the specific lot; and the naming of the quantity is not regarded as in the nature of a warranty, but only as an estimate of the probable amount, in reference to which good faith is all that is required of the party making it.'

"Among numerous cases to the same effect are Pfann & Co. *v.* Lumber Co., 194 Fed. 71, 114 C. C. A. 89; Ramey Lumber Co *v.* Schroeder Lumber Co., 237 Fed. 39, 150 C. C. A. 241; Wemple *v.* Stewart, 22 Barb. (N. Y.) 154; Drake *v.* Vorse, 52 Iowa, 417, 3 N. W. 465; McKeever, Cook & Co. *v.* Canonsburg Iron Co., 138 Pa. 189, 16 Atl. 97, 20 Atl. 938; Loeb *v.* Winnsboro Cotton Oil Co. (Tex. Civ. App.), 93 S. W 515; McIntyre *v.* Jackson, 165 Ala. 271, 51 South. 767, 138 Am. St. Rep. 66, and cases cited in 35 Cyc. 208. Very much in point also is the English case of Burton *v.* Great Northern Ry. Co., 9 Exchequer, 507. In that case Burton had a contract for the